

CHAPTER 4 NEGOTIATION AND AWARD

4-1. Principles.

a. Contract negotiation is a team effort among properly trained and well prepared personnel in engineering, contracting, counsel, project management and other appropriate functional elements.

b. Negotiation will be based on a thorough SOW which fully conveys the customer's requirements and the pertinent technical criteria.

c. Negotiations will be conducted in a professional and sincere manner.

d. The primary objective in negotiation is to agree on a price which is fair and reasonable to the Government (not necessarily the lowest price) and gives the A-E firm sufficient financial incentive to produce quality services and products on schedule.

4-2. Responsibilities. Commanders will ensure that personnel who negotiate A-E services are properly trained.

4-3. Regulatory Basis. A-E contract negotiations will be primarily conducted in accordance with FAR 15.4, 36.605 and 36.606, and supplements thereto.

4-4. Negotiation Team.

a. Team Members.

(1) A-E contract negotiation is a team effort among engineers, architects, contracting specialists, counsel, contract auditors (provide advisory support) and other specialists, under the authority of the KO who is solely responsible for the final price agreement (FAR 15.405(a)). The negotiation team must collectively have a thorough knowledge and understanding of the A-E business community, the detailed project requirements, applicable technical criteria, and contracting policies. (In this pamphlet, negotiators means the members of the Government negotiation team.)

(2) There is no regulation which precludes a Government employee that sat on an evaluation board for an A-E contract from participating on the

negotiation team for that contract. Also, there is no regulation which precludes a member of the negotiation team from participating in the administration of the contract. However, the KO may impose such restrictions if necessary to ensure the integrity of the system of checks and balances.

b. Training. Engineers, architects and surveyors who are primary participants in A-E negotiations will have the following minimum contracting training:

(1) "Architect-Engineer Contracting," PROSPECT course 004; or Defense Acquisition University course CON 243 (same title).

(2) A basic Federal contracting course, approved by the local Director/Chief of Contracting.

(3) A Government contract law course, approved by the local Director/Chief of Contracting.

4-5. Statement of Work. A thorough SOW is the basis for negotiating a fair and reasonable price, successful performance, and fair and effective administration of an A-E contract or task order. The SOW is included as Section C in the USACE A-E contract format (EFARS 15.406-1(a)(2)(A)). A SOW will typically include the following topics:

a. General responsibilities of the A-E firm.

b. Project description, including estimated construction cost, if relevant.

c. Scope of A-E services.

d. Schedule and deliverables. Refer to the most recent guidance from the Tri-Service CADD/GIS Technology Center on sample contract language for CADD and GIS deliverables.

e. Reviews and conferences.

f. Technical criteria and standards, including Government-furnished information.

g. Administrative instructions.

h. General provisions.

4-6. Request for Price Proposal. A firm will be notified by the KO in writing (except for urgent situations) of its selection for negotiation of a contract action and requested to submit a price proposal (FAR 36.606(b)). Appendix R provides RFPP instructions.

4-7. Preproposal Conference.

a. General. When appropriate, a preproposal conference(s) may be held between the A-E firm and pertinent Government representatives to discuss and resolve questions concerning the contract requirements, SOW, and RFPP instructions. The project site may also be inspected if appropriate. An A-E firm's costs for preparing proposals and attending preproposal conferences are normal costs of doing business and are included in a firm's overhead rate. A firm is not compensated for attending a preproposal conference unless the firm performs work of tangible benefit to the Government in connection with the conference, and the work is properly authorized in advance by the KO.

b. Contract Requirements. At the preproposal conference or at some other time early in the negotiation period, the Government will discuss the following contract requirements with the A-E firm and document these discussions in the price negotiation memorandum (PNM):

(1) Performance evaluation process (FAR 36.604, EFARS 36.604 and Chapter 6 of this pamphlet).

(2) Liability for Government costs resulting from design errors or deficiencies (FAR 36.608, 36.609-2, and 52.236-23, and Chapter 7 of this pamphlet).

(3) Design within funding limitations (FAR 36.609-1 and 52.236-22), when applicable.

(4) Registration of designers (FAR 36.609-4 and 52.236-25), when applicable.

(5) Payments (FAR 32.111(d)(1) and 52.232-10, and paragraph 5-7 of this pamphlet).

(6) Subcontractors and Outside Associates and Consultants (Architect-Engineer Services) (FAR

36.606(e), 44.204(b) and 52.244-4)¹.

(7) Subcontracting plan requirements and reporting if the A-E firm is a large business and the contract is over \$500,000 (see paragraphs 4-15 and 5-8).

4-8. Partnering.

a. General. Partnering is the development and sustainment of a relationship that promotes achievement of mutually beneficial goals. See ER 1110-1-12 for additional guidance on partnering, including a sample partnering agreement. If a formal partnering agreement is desired by the Government and/or the A-E firm, it should be discussed during negotiations. However, partnering is voluntary and does not begin until after contract award.

b. Costs. Since it is voluntary, a firm is not directly compensated for partnering on its contract. Typically, the Government and the A-E firm share the costs of partnering, with the A-E firm absorbing its costs in its overhead. However, an A-E firm may be compensated for participating in partnering meetings during construction when the firm's attendance is necessary to discuss the design intent, procedures for responding to the construction contractor's questions on the drawings and specifications, scheduling considerations, or similar project issues. Partnering meetings should be scheduled concurrently with required meetings to minimize costs.

4-9. Service Contract Act (SCA). The SCA (FAR 22.10) applies to an A-E contract if the SOW involves the use of service employees (such as drilling and survey crews, clerks, CADD operators, photographers, and laboratory technicians) to a

¹ The prime A-E firm must obtain the KO's consent to change any subcontractors that were identified during selection and negotiation. The KO should refer the qualifications of any new subcontractor to the original selection board (to the extent that these individuals are available) for evaluation. The KO and negotiators may and should strongly encourage contractors to use a qualification-based selection process like the Brooks A-E Act instead of bidding when selecting subcontractors for professional services.

significant or substantial extent. If the SCA applies, a wage determination (WD) must be obtained from the U.S. Department of Labor (DoL) for the service employees anticipated in the contract. In most cases, the WD may be obtained electronically through the Labor Advisor in the local Office of Counsel. The WD must be provided to the firm for use in preparing its proposal. The proposed labor rates and benefits for service employees must be at least equal to the WD. For surveying and mapping contracts, the WD for the location of the performing office shall be used instead for the WD for the location of the work².

4-10. Independent Government Estimate (IGE). In accordance with FAR 36.605(a), an IGE is required for each A-E contract action expected to exceed \$100,000 (total absolute value of all elements of the action, including credits). An informal or working estimate is recommended for actions of \$100,000 or less. An IGE will be prepared and approved in accordance with the procedures in Appendices S and T. Disclosure of the IGE will comply with FAR 36.605(b).

4-11. Fact-Finding Sessions. The negotiators may hold fact-finding sessions (FAR 15.406-1(a)) with a firm after receiving its price proposal and prior to negotiations. The purpose of fact-finding is to obtain information to better understand the proposal and its assumptions, and to clarify any ambiguities, omissions or uncertainties in the RFPP and SOW apparent after review of the proposal. After fact-finding, a revised proposal may be requested. Detailed proposal analysis or audit should not be performed until a conforming proposal (a proposal which properly reflects the SOW and complies with the RFPP instructions) is received. No negotiation will take place during fact-finding; that is, the Government will not state its bargaining position or objectives during fact-finding.

4-12. Proposal Analysis and Prenegotiation Objectives.

a. Proposal Analysis. An A-E proposal will be analyzed in accordance with FAR 15.404 and

Appendix U. Proposal analysis includes technical analysis, price analysis and cost analysis.

b. Audit. An audit should be considered for the cases listed in DFARS 215.404-2(a)(i)³, and this consideration documented in the PNM. An audit is appropriate if the available information is inadequate to determine the reasonableness of the proposed price (FAR 15.404-2(a)). The Defense Contract Audit Agency is the cognizant audit agency for most USACE contracts.

c. Prenegotiation Objectives (PNO).

(1) PNO are developed after a proposal has been analyzed. The PNO are the pertinent negotiation issues and the cost and profit objectives (FAR 15.406-1). The numerical objectives will be shown in a tabular comparison with the corresponding elements of the proposal, IGE, and audit (if available). Keyed to the numerical objectives will be a discussion of the significant differences among the IGE, audit (if performed), PNO and proposal, and the issues to be covered during the negotiations. The PNO may be organized by phase of work, task, discipline, or other appropriate manner.

(2) The review and approval of PNO will be in accordance with local procedures and at the lowest practicable level appropriate for the complexity, risk and dollar value of the contract action. Local procedures may exempt the review and approval of PNO for small or routine actions.

4-13. Negotiation of FFP Contracts.

a. Conduct of Negotiations. Negotiations should be conducted in an atmosphere of professionalism, patience, and trust. The KO will assign appropriate responsibilities to the team members according to their expertise and maintain overall positive control of the negotiations. The negotiation team must be fully prepared and know what flexibility there is in the Government position. The negotiators must focus on the pertinent issues

² In accordance with CIR Information Letter No. 96-3, CECC-L, 26 July 1996, subject: Service Contract Act Wage Determinations Relating to Surveying and Mapping Services.

³ Also consider an audit for an ID contract where the total contract amount, including all option periods, exceeds the pertinent threshold in DFARS 215.404-2(a)(i) for the anticipated type of task order (fixed-price or cost-reimbursement).

and be willing to adjust the Government's position when appropriate.

b. Statement of Work.

(1) General. The Government and A-E firm should have a common understanding of the SOW before discussing effort and price. The negotiators must ensure that the firm is proposing to use personnel and procedures appropriate for the required work. The negotiators must know if there is any flexibility in the SOW requirements, including the performance schedule. It might be possible to reach agreement if one or more items in the SOW are modified or deleted, or provided by the Government.

(2) Construction Cost. For a contract involving design, agreement must be reached on the estimated construction cost (ECC) of the project because it directly impacts compliance with the 6 percent statutory limitation (paragraph 4-13.c(3)) and the Design within Funding Limitation clause (paragraph 4-7.b(6)). The A-E firm must submit evidence of any perceived deficiencies in the Government cost estimate before the Government agrees to any adjustment to the ECC.

c. Price. Bottom-line price agreement is the primary negotiation objective. However, the negotiators should make a bottom-line price offer only as a final attempt to reach agreement after there is a common understanding of the SOW. The negotiators should not be preoccupied with any single cost item (such as labor hours, labor rates, overhead rates or profit) since agreement on every item is not required to reach overall price agreement (FAR 15.405(a) and (b)). Conversely, final agreement does not indicate agreement on all elements of the proposal. Significant items affecting price agreement must be discussed in accordance with the PNO. The negotiators should not place themselves in a position where they are defending the Government's position. Rather, a firm should be requested to explain and support its proposal and to offer appropriate revisions. Significant elements in price negotiation are discussed below.

(1) Labor and Overhead Costs.

(a) Position classifications and labor hours will be evaluated in the technical analysis (Appendix

U). Labor rates will be examined by audit or review of payroll records and evaluated for reasonableness. Overhead costs will be reviewed, which may include an audit, for allowability in accordance with FAR 31.2. The review will address the allocability of overhead costs to the contract, the acceptability of specific costs according to FAR 31.205, conformance with accounting standards (FAR 30), and reasonableness.

(b) Labor and overhead rates are negotiable. The reasonableness of labor and overhead rates will be evaluated by comparison with relevant market surveys (Appendix T) and similar recent proposals (FAR 15.404-1(c)). When assessing reasonableness, a firm's costs should be compared to efficient, competitive firms in the same class (see Appendix S, paragraph 6.a). Verification of the actuality of labor rates and overhead rates, such as by audit, does not necessarily mean that they are reasonable. Also, since firms can properly allocate costs in different ways, overhead rates, labor rates and the assignment of costs as direct or overhead must be considered together to fairly evaluate reasonableness.

(c) Accordingly, the PNO for labor rates and overhead rates shall not be based upon arbitrary caps. If labor rates and/or overhead rates are so high as to make the total price unreasonable, the negotiators should first seek justifiable reductions in the judgmental elements of the proposal (such as labor hours and position classifications) before negotiating the labor rates and overhead rates.

(2) Profit. It is in the Government's interest to negotiate sufficient profit to stimulate efficient contract performance and to attract the best capabilities of qualified firms (FAR 15.404-4(a)(2) and (3)). Profit must not be negotiated until all costs have been agreed to. The negotiators should be primarily concerned with the total dollar amount of proposed profit, and not the method or rationale used by the firm to estimate profit for itself and any subcontractors (FAR 15.404-4(c)(5)). The profit method for A-E contracts in EFARS 15.793-101 is only used in preparing the Government estimate of a fair and reasonable price. A firm is not required to compute its profit by this method.

(3) Statutory Limitation. The portion of the contract price for A-E services for the preparation of designs, plans, drawings and specifications may

not exceed 6 percent of the project's ECC (FAR 15.404-4(c)(4)(i)(B) and 36.606(a), and DFARS 236.606-70). This limitation is statutory (10 U.S.C. 4540(b)). EFARS 36.606-70(c) provides examples of services which may be excluded from the A-E contract price when determining compliance with the statutory limitation. These examples will be used as a guide in determining other types of services which may be excluded. Preparation of the construction cost estimate is not excluded.⁴ The 6 percent statutory limitation does not apply to a design-build contract, but does apply to an A-E contract for developing a design-build solicitation.

d. Acceptance or Termination of Negotiations. If agreement is reached, the firm will be advised not to begin work until directed by the KO. If agreement can not be reached, the firm will be requested to submit its best and final offer in writing (FAR 36.606(f)) within a reasonable time. If the firm does not submit a final offer in the stated time, its last written proposal will be used as the final offer. No further discussions will be held with a firm if its final offer is not completely acceptable. The firm will be sent a brief letter stating that negotiations are terminated. A PNM will be prepared documenting the unsuccessful negotiations and be approved by the KO. Negotiations may then begin with the next ranked firm. To preclude complaint or protest by the unsuccessful firm, no significant changes should be made in the SOW during negotiations with the next firm.

e. Modifications. The negotiation of modifications generally follows the same procedures as the negotiation of contracts in

accordance with FAR Part 43.

4-14. Negotiation of ID Contracts. The negotiation of an ID contract is similar to a FFP contract, however the negotiation of total prices pertains only to the task orders issued under an ID contract. Agreement on labor rates and overhead rates is the central issue in the negotiation of an ID contract.

a. Labor and Overhead Rates.

(1) Labor and overhead rates will be evaluated similar to a FFP contract. Negotiation should concentrate on the important position classifications anticipated to be used in the contract. A specific hourly or daily rate must be negotiated for each position classification, and a common understanding reached on the type of work that each level of employee will do.

(2) Disagreement over the labor rate for a certain position classification might be resolved by the use of additional classification levels (such as three experience levels for an architect instead of one), or by adjusting the proportion of time of individual employees with different labor rates which comprise that classification. Also, disagreement over labor and/or overhead rates may be resolved by negotiating composite labor and overhead rates. Rates (or a method for determining rates, such as reference to Engineering News-Record cost indices) for contract option periods must also be negotiated.

b. Travel. The schedule of negotiated contract rates will include unit costs for all anticipated travel items such as vehicle cost per mile or day and per diem for certain locations of work. For travel which can not be anticipated, the contract may include a statement that travel costs will be computed in accordance with FAR 31.205-46.

c. Other Direct Costs. A unit cost or price should be negotiated for all anticipated supplies (such as survey monuments) or support services (such as soils tests or computer use). Unit costs or prices may also be negotiated for specific types of services, such as a daily rate for a survey crew or per acre rate for a topographic survey.

d. Profit. Profit will usually be negotiated for each task order under an ID contract. However,

⁴ Preparation of the cost estimate is an integral part of "producing and delivering designs, plans, drawings and specifications" and is therefore, subject to the 6 percent limitation. The mandatory Design within Funding Limitation Clause (FAR 52.236-22) requires an A-E firm to design a project within the construction budget. The estimate must be prepared coincident with the construction documents to guide the selection of materials, components, and systems and keep the project within budget. Hence, the estimate is a necessary and integral part of the design process, and is not excludable.

a standard profit rate for all task orders may be established in an ID contract if all orders will be very similar in nature, complexity, risk, price, and performance period. In either case, the profit rate will be applied to the total of the prime firm's costs and any subcontractors' costs (without profit) to avoid unreasonable layering of profit (i.e., no profit on profit).

e. Acceptance or Termination of Negotiations. Agreement on every rate, such as labor, overhead, or travel, is not necessary. The negotiators should consider the impact of specific rates on the prices of typical task orders anticipated under the contract. The rates for certain classifications (such as a principal) may exceed the PNO but may not be significant costs in typical task orders. If the final offer is not acceptable, negotiations will be terminated similar to a FFP contract.

f. Task Orders.

(1) The negotiation of a FFP task order is very similar to a FFP contract, except that the labor rates, overhead rates, and certain other unit costs or prices (and maybe profit) are already fixed in the ID contract. Also, there is a limitation in an ID contract on the cumulative amount of all orders that must be considered, and possibly a limitation on the price of individual task orders. Negotiation typically concerns the quantity and mix of various position classifications. A task order may be modified, have options, or include work involving minor cost elements that are not in the contract rate schedule. The amount of a modification (including exercise of an option) of a task order will be counted against the ceiling of the contract period in which the task order was issued.

(2) The SOW of a task order must be within the scope of the ID contract (FAR 16.505(a)(2)). For any task order over \$500,000, the contract file must be documented to justify why a task order was used instead of publicly announcing the requirement (EFARS 36.601-3-90(f)). The reasons should relate to the basic reasons for using an ID contract in EFARS 36.601-3-90(a). Also, the contract file must be documented to justify the basis for issuing a task order under a particular ID contract when the order could have been issued under more than one ID contract (EFARS 36.601-3-90(h)). Price can not be considered.

4-15. Subcontracting Plan.

a. General Requirements. A Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan is required for any A-E contract over \$500,000 (including any options) with a large business if there are subcontracting possibilities (FAR 19.702, 19.704, 19.705-2 and 52.219-8). The subcontracting plan is an element of the negotiation process and is made a part of the contract. A change in subcontractors from those proposed on the SF 255 must be approved by the KO (FAR 44.201-3(a)); see paragraph 4-7(b)(6).

b. Goals. The command subcontracting goals are considered in negotiation of subcontracting plans, but do not necessarily have to be met for the plan for an individual contract to be acceptable. The subcontracting goals should be tailored to the specific circumstances of each contract, including the subcontractors proposed (and accepted) on the SF 255 and the magnitude and nature of the work. FAR 19.705-4(c) cautions against setting unrealistically high goals that could "significantly increase the Government's cost or seriously impede the attainment of acquisition objectives."

4-16. Price Negotiation Memorandum. The negotiators will complete the PNM (FAR 15.406-3 and supplements thereto) promptly after concluding negotiations. A PNM will discuss the principal elements of the negotiation. The PNM will demonstrate that the final accepted price complies with the 6 percent statutory limitation, if applicable. If an audit was performed, the PNM will discuss any deviations from the audit recommendations in the final negotiated price. A PNM shall be prepared, reviewed and approved in accordance with local procedures (EFARS 15.808). Ordinarily, review and approval of a PNM should be concurrent with the review and approval of the final contract instrument.

4-17. Preaward Survey. The selection process addresses the technical capability, production resources and quality assurance methods of the firm. Hence, a short-form preaward survey report (only SF 1403, Preaward Survey of Prospective Contractor (General)) in accordance with FAR 9.106-4(d) is typically adequate. The main emphasis of the preaward survey should be

checking the financial capability of the firm through Dunn and Bradstreet reports, statements from the firm's bank, annual financial statements, or other appropriate means. Also, a contractor must be registered in the DoD Central Contractor Registration (CCR)⁵ to be eligible for a contract (DFARS 204.73 and 252.204-7004).

4-18. Contract Preparation and Award.

a. General. An A-E contract will be prepared using the uniform contract format in FAR 15.204.1. The contract may state a notice to proceed (NTP) date or the KO may send a separate NTP letter after contract award. If a contract is executed by mail, the KO should sign the contract after it has been signed by the contractor (FAR 4.101). However, if the action is urgent, an award letter (Appendix I) can be used, which also serves as the NTP.

b. ID Contracts. In order to satisfy the minimum contract guarantee (EFARS 16.504(a)(1)), the best practice is to issue the first task order using project funds at the same time the ID contract is awarded. However, in no case will the award of an ID contract be delayed more than 90 days after the completion of negotiations of the contract.⁶ If

the first task order is not issued simultaneously with award of the ID contract, then the minimum guarantee shall be obligated⁷ at the time of contract award using project funds if the contract is customer-specific, or using the appropriate departmental overhead or revolving funds if the contract serves many customers.

4-19. Task Order Issuance. IDC task orders are prepared using DD Form 1155, Order for Supplies or Services (DFARS 216.506). A DD Form 1155 for an ID contract task order need only be signed by the KO or ordering officer. The DD Form 1155 is a NTP.

4-20. NAF Contracts. AR 215-4 specifies the general procedures for NAF contracting. The FAR and its supplements, including the 6 percent statutory limitation, do not apply. Otherwise, the negotiation of an A-E contract for an NAF project should generally comply with this pamphlet.

⁵ A firm does not have to be registered in the CCR, nor have a Data Universal Numbering System (DUNS) number or Commercial and Government Entity (CAGE) code (both of which are required by the CCR), to be considered by an A-E evaluation board. Hence, a synopsis may request that interested firms include their DUNS number and/or CAGE code on their SF 255, if already assigned, but not mandate that firms obtain these identifiers as a condition of submission.

⁶ In accordance with PARC Instruction Letter 97-1, subject: USACE Inspector General Report on Funding of A-E Indefinite Delivery Contracts, 16 April 1997 (originally issued as Instruction Letter 96-11, 18 February 1997).

⁷ Immediately upon award of a task order(s) in sufficient amount to satisfy the minimum guarantee, the KO must deobligate the funds used to award the ID contract. Obligation of funds to satisfy the minimum guarantee shall not be reported on a DD Form 350, Individual Contracting Action Report (Over \$25,000), unless the minimum guarantee is not satisfied by the end of the contract period. See footnote 6 for reference.